IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 27-3-2007

Coram

The Honourable Mr.Justice P.SATHASIVAM
and
The Honourable Mr.Justice N.PAUL VASANTHAKUMAR

W.A.Nos.2077 of 2004
W.A.M.P.No.3905, 6730 of 2004

1. The Executive Officer,
Arulmighu Thiruvalleswarar thirukkoil,
Padi, Chennai - 50.

2. P.S.Shanmugasundaram ... Appellants/Respondents 3 & 4

Vs.

1. Jagathambigai Nagar Co-Operative
House Site Society, rep.by its President,
No.81-A, Thiruvalluvar Street,
Padi, Chennai - 50.

2. S.P. Pandian

3. S. Veeraragavalu

4. A. Thirunavukkarasu

5. S. Parthasarathy Respondents 1 to 5/Petitioners

6. The State of Tamil Nadu,
rep.by the Secretary to Government,
Hindu Religious and Charitable
Endowments Departments,
Fort St.George, Chennai - 9.

7. The Commissioner,
Hindu Religious and Charitable
Endowments Department,
chennai - 600 034. ... Respondents 6 & 7/Respondent 1 & 2

This writ appeal is preferred under Clause 15 of Letters Patent against the order of this Court made in W.P.No.15527 of 2000 dated 31.3.2004 the Writ Petition filed under Article 226 of the Constitution of India to

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issue a Writ of Mandamus directing the 2nd respondent to filed enquiry under Section 34 of the HR & CE Act 1959 as directed by this Honourable Court and consequently sell the house sites at the same rate fixed in 1984 to the 135 members of the petitioner society whose houses are given in the typed sets who are owning the superstructure and occupying and living in the said temple lands.

For Appellant	:	Mr.Sriram for M/s.A.S.Kailasam & Associates
For Respondents 1&4	:	No appearance
For Respondents 2,3&5	:	Mr.N.G.R.Prasad, for Mr.R.Rajaram
For Respondents 6&7	:	Mr.T.Chandrasekaran, Spl. GP, HR&CE

JUDGMENT

N. PAUL VASANTHAKUMAR, J.

This writ appeal is directed against the order of the learned single Judge made in W.P.No.15527 of 2000 dated 31.3.2004 allowing the writ petition filed by the writ petitioners/respondents 1 to 5 herein. Respondents 3 and 4 in the writ petition are appellants herein.

2. Parties herein will be described as arrayed in the writ petition.

3. The brief facts necessary for disposal of the writ appeal are as follows.

(a) The first petitioner Society is a registered Housing Society representing the residents of Jagadambigai Nagar, Sakthi Nagar and Thiruvalleeswarar Colony. The respondents 3 and 4 are the Executive Officer and Hereditary Trustees of Arulmigu Thiruvalleeswarar Thirukoil, an ancient temple at Padi in Madras. The temple owns considerable extent of lands comprised in S.No.271, 303/1 to 4, 364/1 to 3 near the temple.

(b) The trustees of the temple in the year 1968 decided to give the lands on lease to the individuals, who were desirous of constructing superstructure on the said lands at their own costs. Several leaseholders constructed superstructures and some of them sold superstructures to the third parties, giving up their leasehold right in the house sites. Thus, there are original allotees and subsequent purchasers of superstructures for whom the first petitioner Society represents.

(c) The first petitioner Society requested the respondents to sell the house sites to the individuals, who are occupying the said house sites. The second respondent decided to sell the lands to the occupants by proceedings Na.Ka.No.11/76 R2, dated 7.12.1984 followed with Government Order dated 7.12.1984. Objections were invited and enquiry was conducted as per section 34 of the HR&CE Act, 1959. There was no objection and

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therefore the respondents decided to sell the house sites to the occupants. The said order dated 7.12.1984 was challenged by some of the individuals interested in the welfare of the temple in W.P.No.286 of 1986 before this Court and during the pendency of the writ petition some of the occupants obtained sale deed in their favour and from 15.10.1987 respondents stopped allotment of house sites through sale.

(d) This Court by order dated 11.1.1994 set aside the order of the second respondent dated 7.12.1984 and remitted the matter back to the Commissioner, HR&CE for fresh disposal by following the provisions of the Act and Rules. The Commissioner was directed to issue notice to the interested parties and pass final orders before passing order under section 34 of the HR&CE Act. The second respondent till date has not passed any order and also not taken any steps to consider the matter afresh and therefore the first petitioner was taking effective steps to make the second respondent to conduct enquiry by submitting various representations from 29.8.1997 to 8.6.2000.

(e) No action having been taken by the second respondent in respect of the said representations, petitioners have filed the writ petition for issuing a writ of mandamus directing the second respondent to hold enquiry under section 34 of the HR&CE Act, 1959, as directed by this Court and consequently sell the house sites at the same rate fixed in 1984 to 135 members of the Society, whose names are given in the typed set of papers and who are owning the superstructure and occupying and living in the said temple lands.

(f) The contentions raised in the writ petition are that the hereditary trustee in his letter dated 4.3.1998 addressed to the Commissioner, recommended transfer of house sites to the occupants. Similarly, the Deputy Registrar Housing, by letter datted 25.3.1998 addresssed to the Commissioner, requested to pass orders for transfer of the house sites to the occupants. Society submitted report on behalf of 135 member, but no action was taken by the respondents even though about 66 persons were already given sale deeds in their favour and the other members are discriminated by not extending the same benefit to them.

4. The Executive Officer filed counter affidavit wherein it is stated that the State Government has enacted Act 2 of 1996 in order to protect the temple proeprties and if the temple lands are sold the temple will be left with no income and under Act 2 of 1996, even statutory tenants are prohibited to purchase the temple lands. It is further stated that the sale of temple property can be effected ony after getting permission from the Government under section 34 of the HR&CE Act and the Commissioner shall record his reasons for his satisfaction to recommend the sale and the said decision can be questioned by the trustees if it is not for the benefit of the temple and the petitioners cannot seek a mandamus to compel the HR&CE Commissioner to sell the lands under section 34 of the Act.

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5. The learned single Judge allowed the writ petition on the ground that the Hereditary and Managing Trustees of the temple will propose to sell the lands and the petitioners were directed to negotiate the sale consideration with the 4th respondent and make a representation to the second respondent Commissioner for the sanction of sale and on receipt of the said representation the Commissioner was directed to obtain prior approval of the Government as contemplated under section 34 of the Act and pass appropriate orders having regard to the necessity for the sale concluded long back i.e., on 7.12.1984 and that the quantum of sale consideration alone should be decided for the benefit of the temple.

6. The said order of the learned single Judge is challenged by the Executive Officer and Hereditary Trustee in this writ appeal on the ground that in the earlier writ petition, this Court in W.P.No.286 of 1986 by order dated 11.1.1994, having set aside the decision taken to sell the land on 7.12.1984 and remitted the matter to the second respondent for fresh disposal strictly according to the provisions of the Act and Rules, the learned single Judge in the subsequent writ petition is not justified to give a positive direction to sell the land and negotiate only with regard to the quantum of the sale consideration.

7. The learned counsel for the appellants submitted that the said direction impugned in this writ appeal is contrary to the direction issued earlier in the above referred order and the decision to sell the land has already been set aside and therefore denovo consideration under the provisions of the HR&CE Act has to be made by the department in accordance with section 34 of the Act and the discretionary right of the department cannot be curtailed by the order of this Court and prayed for allowing the writ appeal. The learned counsel also cited two decisions of this court reported in 1989 WLR 1 (The Commissioner of HR&CE v. Mary Isabal) and our decision made in W.A.No.2524 of 2001 and 253 of 2002 (T.Subbaraman and others v. Sri Vedanda Desikar Devasthanam, Madras and another) dated 20.1.2007.

8. The learned counsel for the respondents submitted that the decision to sell the lands for the interest of the temple was already taken and 66 persons were already given sale deeds and the remaining members are also entitled to get same treatment and they are prepared to pay the market rate as fixed in the year 1984. The interest of the temple will not be affected since the then Executive Officer and the Hereditary Trustee recommended for the sale of the remaining land and the decision to sell the land having been taken already, the learned judge is right in issuing a direction with reference to the facts of this case and the said order is sustainable.

9. We have considered the rival submissions made by the learned counsel for the appellants as well as the respective respondents.

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10. The point in issue is whether the appellants can be compelled to sell the temple lands to the writ petitioners.

11. It is not in dispute that even though a decision to sell the lands was taken as early as on 7.12.1984, the said order was set aside by this Court in W.P.No.286 of 1986 by order dated 11.1.1994. Reason for setting aside the order is stated in paragraph 4 of the order, which reads as follows,

> "4. In view of the stand taken by the 1st Respondent, the order challenged in the Writ Petition has to be set aside and the matter has to be remitted back to the 2nd Respndent-The Commissioner, Hindu Religious and Charitable Endowments Department, Madras, for fresh disposal according to the provisions of the Act and the Rules framed thereunder. Before passing the fresh order under Section 34 of the Act, the second respondent is directed to issue notice to all the interested parties, hear their representations and pass final orders under section 34 of the Act according to the provisions of the Act and the Rules framed thereunder. The Writ petition is ordered in the above terms. No costs."

The first petitioner in the present writ petition was respondent NO.7 in the earlier writ petition. No appeal was filed against the said order of the single Judge. Hence the said order of the learned single Judge dated 11.1.1994 has become final. The sale of temple land is governed under the provision of section 34 of the HR&CE Act, 1959, which reads as follows,

> "Section 34. Alienation of immovable Trust property (1) Any exchange, sale or mortgage and any lease for a term exceeding five years of any immovable property, belonging to, or given or endowed for the purposes of, any religious institution shall be null and void unless it is sanctioned by the Commissioner as being necessary or beneficial to the institution.
>
> Provided that before such sanction is accorded, the particulars relating to the proposed transaction shall be published in such manner as may be prescribed, inviting objections and suggestions with respect thereto; and all objections and suggestions received from the trustee or other persons having interest shall be duly considered by the Commissioner.
>
> Provided further that the Commissioner shall not accord such sanction without the previous approval of the Government.
>
> Explanation-Any lease of the property above mentioned though for a term not exceeding five years shall, if it contains a provision for renewal for a further term (so as to exceed five years in the

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aggregate) whether subject to any condition or not be deemed to be a lease for a period exceeding five years.

(2) When according such sanction the Commissioner may impose such conditions and give such directions as he may deem necessary regarding the utilisation of the amount raised by the transaction the investment thereof and in the case of a mortgage, regarding the discharge of the same within a reasonable period.

(3) A copy of the order made by the Commissioner this section shall be communicated to the Government and to the trustee and shall be published in such manner as may be prescribed.

(4) The Trustee may within three months from the date of his receipt for copy of the order, and any person having interest may, within three months from the date of the publication of the order, appeal to the Court to modify the order or felt it aside.

(4-A) The Government may issue such directions to the Commissioner as in their opinion are necessary, in respect of any exchange, sale mortgage or lease of any immovable property, belonging to, or given or endowed for the purpose of, any religious institution and the Commissioner shall give effect to all such directions.

(5) Nothing contained in this section shall apply to the inams referred to in section 41."

12. It is not in dispute that for the non-compliance of the statutory provision, this Court set aside the earlier decision to sell the lands and the department was directed to conduct denovo consideration. Section 34 makes it clear that before sale of the temple property, there must be a sanction by the Commissioner and there must be a specific finding by the Commissioner to the effect that the same is necessary or beneficial to the institution. After arriving at such conclusion by the Commissioner before ordering sanction, the proposed transaction shall be published in the prescribed manner, inviting objections, suggestions, with respect thereto and all objections and suggestions received from the trustees or other persons having interest are to be duly considerd by the Commissioner. The second proviso to sub-section (1) makes it clear that the Commkissioner shall not accord such sanction without previous approval of the Government. Hence it is clear that the lands belonging to religious institutions without compliance of the conditions prescribed in Section 34, no sale, mortggage or lease exceeding a period of five years is permissible.

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13. A similar issue was considered by us in W.A.No.2524 of 2001 and 253 of 2004 by judgment dated 20.1.2007 wherein we have considered the scope of section 34 of the HR&CE Act and held that there cannot be any direction by this Court to compel the respondents to sell the lands belonging to religious institution in favour of the petitioners. We confirmed the decision of the learned single Judge dismissing the writ petitions by holding that the lessees cannot either compel the religious institutions to sell or seek direction from the competent authority to accord sanction under section 34 of the Act.

14. A Divisiion Bench of this Court in the decision reported in 1989 WLR 1 (The Commissioner of HR&CE v. Mary Isabal) in paragraphs 9 and 14 held as follows,

> 9. S.34 is a very important section with regard to the power of alienation by the religious or charitable institution. That section categorically provides that in the absence of sanction any exchange, sale or mortgage and any lease beyond the period of five years whatever may be the case, would be null and void. That means, the power to grant sanction is coupled with a duty to consider and the duty to consider ordains the Commissioner to have regard to (1) the necessity for sale and (2) whether the sale is beneficial to the institution. In this case neither of these considerations had crept in, or had the Commissioner considered the same. Therefore, the learned Judge had not found a finding in this regard. Therefore, now to direct, as the learned Judge had done, would amount to foreclosing the consideration of these two vital aspects. For ought one knows the commissioner may still find that the sale is necessary or again it is beneficial to the institution. Merely because the Assistant Commissiioner in his report dated 11.12.1972 has stated that the sale is necessary, it does not follow that it would be binding on the Commissioner. Still on the only statutory authority conferred with the power of sanction, it will have to consider that the sale is necessary and beneficial to the institution. The learned Judge had assumed these aspects in favour of the petitioner in that writ petition having regard to the circumstances of the case. Further the learned Judge has substituted his direction to that of the Commissioner's direction. Therefore, in any event, the direction contained in paragraph 7, commanding the Commissiioner to issue sanction cannot be supported in law."
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14. While granting the sanction, the Commissioner will have to examine and find out as a fact whether exchange, sale and mortgage is (1) necessary; and (2) beneficial to the institution. Therefore, grant of sanction is based on these two important elements. In order to find out either necessity or benefit to the institution, the Commissioner must have materials. This is where the proviso comes into operation. The proviso says that objections and suggestions could be received not only from the trustees, but also from other persons having interest, as well. Therefore, from the materials placed before the Commissioner, as a fact, he has to find out whether it is necessary or beneficial to the institution. No doubt, he may seek the aid of the subordinate officer, like the Assistant Commissioner or any other person. But, again, as we pointed out now, because the Commissioner and the Commissioner alone has been constituted the statutory authority for the grant of sanction, he will have to find out, as of fact. Merely because the Assistant Commissioner or the Deputy Commissioner or any other officer says that the sale is necessary or beneficial to the institution, that does not mean that the Commissioner will have to accept the report, nor again that report can be relied on, as though it is a substitute for his finding. All these precautions were made because the religious institution is practically made the custodian of the property in whose name the alienation is done in disregard of the necessity of the institution. The very object of creating the highest authority in the set-up of the Endowment Board as sanctioning authority is of a great legal significance. It is also to be noted in this connection that such a power cannot be delegated by the Commissioner, because it is a plenary power. While saying so, we are aware of S.13 of the Act, which speaks of delegation. But we need not pursue this line of reasoning. All that we endeavour to point out is that this is a safeguard to prevent indiscriminate alienation by the religious institution. If such an alienation takes place contrary to the provisions of the Act, to make it null and void ab initio, it would have serious repercussions, because after several years one may say that he had not derived valid title because of the lack of statutory sanctions. It is with this background that we have to analyse the fact."

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15. As held in the above cited Division Bench decision and also by us in W.P.No.2524 of 2001 & 253 of 2002, and having regard to the fact that the earlier decision to sell the lands dated 7.12.1984 having been set aside as early as in the year 1994, we are of the view that the learned Judge is not right in issuing a mandamus to accord sanction to the proposal after negotiating the sale consideration alone and in effect the said direction amounts to curtailing the discretion of the statutory authorities as contemplated under section 34 of the Act. However, the respondents shall take note of the sale of the lands for 66 persons similarly placed while taking decision as to whether to sell the lands any more or not and the benefit of the temple alone should be the criteria and the same can be decided by the respondents on denovo consideration under the provisions of the Act as ordered in W.P.No.286 of 1986 dated 11.1.1994. The respondents shall comply with the above direction within six months from the date of receipt of copy of this judgment.

16. The writ appeal is allowed with the above observation and the order of the learned single Judge is set aside. No costs. Connected miscellaneous petitions are closed.

Sd/
Asst.Registrar

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Sub Asst.Registrar

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To

1. The Secretary to Government,
   Hindu Religious and Charitable Endowments
   Departments, Fort St.George, Chennai - 9.

2. The Commissioner,
   Hindu Religious and Charitable Endowments Department,
   Chennai - 600 034.

1 cc To M/S.A.S.Kailasam Associates, Advocate, SR.19687.
2 cc To Mr.R.Rajaram, Advocate, SR.19435.
1 cc To The Special Government Pleader (HR & CE), SR.19573.
1 cc To The Government Pleader, SR.19413.

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